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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions	)	
of the Telecommunications Act of 1996	)	

SUPPLEMENTAL ORDER

Adopted: November 24, 1999 **Released: November 24, 1999**

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. On September 15, 1999, we adopted the Third Report and Order and Fourth Further Notice of Proposed Rulemaking in this docket responding to the Supreme Court's January 1999 decision that directed us to reevaluate the unbundling obligations of section 251 of the Telecommunications Act of 1996. (1996 Act).[1] We hereby modify that Order with regard to the use of unbundled network elements to provide exchange access services.[2]

2. We conclude that, until resolution of our Fourth FNPRM, which will occur on or before June 30, 2000, interexchange carriers (IXCs) may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities (or obtain them from third parties). This constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.

II. DISCUSSION

3. In the *Third Report and Order and Fourth FNPRM*, we concluded that we would address in the Fourth FNPRM whether there were any legal or policy ramifications of applying

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[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) (*Third Report and Order and Fourth FNPRM*) (citing *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999)).

[2] *Id.* at paras. 483-89.

our unbundling rules in a way that could "cause a significant reduction of the incumbent LECs' special access revenues prior to full implementation of access charge and universal service reform."[3] We also concluded, in paragraph 486, that any requesting carrier is entitled to obtain existing combinations of loops and transport between the end user and the incumbent LEC's serving wire center on an unrestricted basis at unbundled network element prices, and that a carrier that is collocated in a serving wire center is free to order combinations of loops and dedicated transport to that serving wire center as unbundled network elements as a substitute for the incumbent LECs' regulated special access services.[4]

4. Since the release of the *Third Report and Order and Fourth FNPRM*, several incumbent LECs have claimed that we did not sufficiently preserve the special access issue in the Fourth FNPRM. Specifically, they contend that paragraph 486 allows collocated IXCs that self-provision entrance facilities (or obtain them from third parties) to convert the remaining portions of their special access circuits to unbundled network elements, even though the IXCs are not using the facilities to provide local exchange service. They contend that this would have significant effects in the competitive local exchange market as had been asserted previously to the Commission by BellSouth.[5] We intended to compile a complete record in the Fourth FNPRM prior to determining whether IXCs may employ unbundled network elements solely to provide exchange access service.[6] Accordingly, in order to preserve this issue in the Fourth FNPRM as we intended, we modify our conclusion in paragraph 486 to now allow incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service subject to the requirements in this Order.[7] We also modify our conclusion in paragraph 489 to the extent that it limited our concerns to entrance facilities.[8] We now conclude that, until

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[3] *Id.* at para. 489.

[4] *Id.* at para. 486.

[5] *See* Letter from Michael Kellogg, on behalf of SBC, to Magalie Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Nov. 18, 1999); Letter from Dee May, Director, Federal Regulatory Affairs, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Nov. 17, 1999); Letter from William B. Barfield, Associated General Counsel, BellSouth Corporation, to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98 (filed Aug. 9, 1999) (*BellSouth Aug. 9, 1999 Ex Parte*). BellSouth's *Aug. 9, 1999 Ex Parte* indicated that the use of combinations of unbundled loops and transport solely for exchange access service would either increase the incumbent's local rates or undermine universal service, or both. *BellSouth Aug. 9, 1999 Ex Parte* at 1. We underestimated the extent of the policy implications associated with temporarily constraining IXCs only from substituting entrance facilities for the incumbent LEC's special access service, and we therefore now, as explained herein, include combinations of unbundled loops and transport network elements within the scope of this temporary constraint.

[6] *See Third Report and Order and Fourth FNPRM* at para. 496.

[7] *Id.* at para. 486 (stating that it would be impermissible for incumbent LECs to require that a requesting carrier provide a certain amount of local service over combinations of unbundled loop and transport facilities).

[8] *Id.* at para. 489 (stating that we will consider in the Fourth FNPRM the "discrete situation involving the use of dedicated transport links between the incumbent LEC's serving wire center and an interexchange carrier's switch or point of presence (or 'entrance facilities')."

resolution of our Fourth FNPRM, which will occur on or before June 30, 2000, IXCs may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities (or obtain them from third parties). This will give us sufficient time to issue an order addressing the Fourth FNPRM.

5. This constraint does not apply if an IXC uses combinations of unbundled loop and transport network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.[9] It therefore does not affect the ability of competitive LECs to use combinations of loops and transport (referred to as the enhanced extended link) to provide local exchange service. It also does not affect the ability of competitive LECs that are collocated and have self-provided transport (or obtained it from third parties), but are purchasing unbundled loops, to provide exchange access service. As we stated in paragraph 487 of the *Third Report and Order and Fourth FNPRM*, such a competitive carrier is entitled to purchase unbundled loops in order to provide advanced services (*e.g.*, interstate special access xDSL service).[10] Finally, the constraint will have no effect on competitive LECs using long distance switches to provide local exchange service.

6. We also expand the scope of the Fourth FNPRM to seek comment on whether there is any basis in the statute or our rules under which incumbent LECs could decline to provide combinations of loops and transport network elements at unbundled network element prices. We also seek comment on the argument that the "just and reasonable" terms of section 251(c) or section 251(g) permit the Commission to establish a usage restriction on combinations of unbundled loops and transport network elements. Parties should also address whether there is any other statutory basis for limiting an incumbent LEC's obligation to provide combinations of loops and transport facilities as unbundled network elements. As we stated in the *Third Report and Order and Fourth FNPRM*, in light of the fact that it is not clear that the 1996 Act permits any restrictions to be placed on the use of unbundled network elements,[11] we particularly urge parties to consider and address what long term solutions may be necessary to avoid adverse effects on any special access revenues that support universal service.

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[9] For example, we would consider the local service component as described in a joint Ex *Parte* submitted by Intermedia to be significant. *See* Letter from Edward D. Young, III, Senior Vice President and Deputy General Counsel, Bell Atlantic; Heather B. Gold, Vice President-Industry Policy, Intermedia Communications; Robert W. McCausland, Vice President-Regulatory and Interconnection, Allegiance Telecom; Don Shepheard, Vice President, Federal Regulatory Affairs, Time Warner Telecom, to Chairman Kennard and Commissioners, Federal Communications Commission, CC Docket No. 96-98, at 1-2 (filed Sept. 2, 1999). In addition, we will presume that the requesting carrier is providing significant local exchange service if the requesting carrier is providing all of the end user's local exchange service. Because we intend the constraint we identify in this Order to be limited in duration, we do not find it to be necessary for incumbent LECs and requesting carriers to undertake auditing processes to monitor whether or not requesting carriers are using unbundled network elements solely to provide exchange access service. We expect that allowing requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled loops and transport network elements will not delay their ability to convert these facilities to unbundled network element pricing, and we will take swift enforcement action if we become aware that any incumbent LEC is unreasonably delaying the ability of a requesting carrier to make such conversions.

[10] *Third Report and Order and Fourth FNPRM* at para. 487.

[11] *Id.* at para. 484.

7. This temporary constraint on the use of combinations of unbundled loops and transport network elements to provide exchange access service is consistent with the Commission's finding in the *Local Competition First Report and Order*, that we may, where necessary, establish a temporary transitional mechanism to help complete all of the steps toward the pro-competitive goals of 1996 Act, including the full implementation of a competitively-neutral system to fund universal service and a completed transition to cost-based access charges.[12] We believe that this short-term constraint will avoid disturbing the status quo while we consider the legal and economic implication of allowing carriers to substitute combinations of unbundled loops and transport network elements for the incumbent LECs' special access services. As we did in the *Local Competition First Report and Order*, we emphasize that this constraint will apply only as an interim measure.[13]

III. FINAL REGULATORY FLEXIBILITY ANALYSIS

8. In the *Third Report and Order and Fourth FNPRM*, we conducted a Final Regulatory Flexibility Analysis, as required by section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603. The changes we adopt in this Order do not affect that analysis.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that pursuant to authority contained in sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, 303(r), the Commission amends paragraph 486, 489, and 494-96 in the *Third Report and Order and Fourth FNPRM* to be consistent with the discussion set out above. Thus, the constraint on the use of unbundled network elements as a substitute for special access service and the scope of the corresponding inquiry in the Fourth FNPRM are not limited to entrance facilities, but instead include combinations of unbundled loops and transport network elements. This constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

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[12] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd at 15499, 15862-69, paras. 716-32 (1996) (*Local Competition First Report and Order*).

[13] *Id. at* 15866, para. 725.

DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order, CC Docket 96-98.

I dissent from the Commission's modification of its *Third Report & Order* in this docket, in which the Commission broadens the restriction it placed on competing carriers' uses of combinations of unbundled loops and transport network elements. Not only is the order procedurally defective, but also the Commission's use restrictions are without a basis in the statute.

First, I believe that, in issuing this order, the Commission has failed to comply with statutory procedural requirements. An agency may not fundamentally reinterpret a published order or regulation without complying with the Administrative Procedure Act's notice and comment provisions. *See* 5 U.S.C. § 551. The United States Court of Appeals for the District of Columbia has recognized that, "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *See Alaska Professional Hunters Ass'n v. FAA*, 177 F. 3d 1030, 1035 (D.C. Cir. 1999) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking."); *see also National Whistleblower Center v. Nuclear Regulatory Commission*, 1999 WL 1024662, at * 4 (D.C. Cir. Nov. 12, 1999) ("[T]o allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment would undermine those APA requirements.") (quoting *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997). In my opinion, it is improper for the Commission to modify its prior position on this issue without first having made the public aware that it was considering changing its order and without first having obtained comment from interested parties.

Second, as I explained when the Commission released the *Third Report & Order*, the statute simply does not authorize the Commission to limit the uses to which a competing carrier may put an unbundled network element. *See* Statement of Commissioner Furchtgott-Roth, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket 96-98 (concurring in part and dissenting in part). The statute's only requirement is that an unbundled network element be used in "the provision of a telecommunications service." 47 U.S.C. § 251(c)(3). Section 251(c)(3) says nothing more about the uses to which a requesting carrier may put an unbundled network element, and no other provision in the 1996 Act authorizes the Commission to limit the ways in which a requesting carrier may use an incumbent's network elements.[1] Thus, a competitor may use *any* network element or combination of elements in *any* way it wishes, subject only to the requirement that the elements be used to provide "a telecommunications service."

[1] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499, 15679 [¶ 356] (1997) (hereinafter *Local Competition First Report and Order*).

The Commission is concerned that, without the restriction, the market for special access services will be undermined, because competitors will be able to offer combinations of network elements as a lower-priced substitute for incumbents' special access services. I believe that there are other ways that the Commission could have addressed this concern consistent with the statute. Since the problem stems from the Commission's rules for access charges, the obvious answer is a prompt revision of those rules, so that incumbent carriers are no longer required to include implicit subsidies in their prices for access services. *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 425 (5th Cir. 1999). Pending a revision of these access charge requirements, the Commission could have implemented a temporary pricing mechanism that prevents new carriers from undercutting incumbent carriers' prices. *See Local Competition First Report & Order*, 11 FCC Rcd at 15864 [¶ 720] (permitting incumbents, for a limited period of time, to recover a percentage of carrier common line and transport interconnection charges for all interstate minutes traversing the incumbents' local switches for which the interconnecting carriers pay unbundled local switching element charges). Or it could have, in the *Third Report & Order*, decided against unbundling local transport. What the Commission may not legally do, however, is impose restrictions on the ways in which requesting carriers may use the network elements that they purchase from incumbents.